1970

Filling and Building on Small Lakes—Time for Judicial and Legislative Controls

Ralph W. Johnson
University of Washington School of Law

G. Richard Morry

FILLING AND BUILDING ON SMALL LAKES —TIME FOR JUDICIAL AND LEGISLATIVE CONTROLS†

Ralph W. Johnson*
G. Richard Morry**

During this new decade, Americans will, and indeed must, become increasingly concerned about the preservation of open spaces and the maintenance of a habitable environment. The lack of adequate open space in metropolitan areas is already particularly disturbing. Despite years of planning and zoning, the few remaining open areas in American cities continue to succumb to developmental pressures. In some communities the existence of lakes constitutes an important exception to this history of failure. Lakes are natural open spaces and are more difficult to destroy, or encroach upon, than dry land areas, and, as such, they offer a special dimension of beauty, color, and recreational potential to metropolitan residents. But recently, even lakes have come to be damaged and destroyed, for population growth and investment potential have combined to attract the attention of developers, who are now commencing, with fills and buildings, to invade and diminish these natural open areas.[1]

To date the law has given little notice to this problem. In the past, lake law has been preoccupied with questions of consumptive use, and more recently with disputes between recreational users.[2] Wide-

† The authors are indebted to the Conservation Foundation, Washington, D.C., for its generous financial support of this research. Although Professor Johnson was associated as co-counsel for the appellants in *Bach v. Sarich* on appeal, he co-authors this article not as an advocate but as a commentator on the need for policy development in this area. An earlier and somewhat different version of this article has been previously published. Johnson & Morry, *New Small Lake Law: Open Space and Recreation v. Filling and Building*, in CONTEMPORARY DEVELOPMENTS IN WATER LAW (Center for Research in Water Resources, Water Resources Symposium No. 4) (C. Johnson & S. Lewis eds. 1970).

* Professor of Law, University of Washington; Diploma, Lehigh, 1945; B.S. in Law, 1947, LL.B., 1949, Oregon.

** 3rd year law student, University of Washington; B.A., 1965, University of Washington.

[1] It is not only the lakes in the older metropolitan areas that are in danger of suffering this fate, but also the formerly rural lakes now enveloped by the radiation of suburban areas out from the city cores.

[2] For a general discussion of the shift of water law from preoccupation with irrigation and other consumptive uses to the newer water uses, such as recreation and homesites, see Johnson, *Riparian and Public Rights in Lakes and Streams*, 35 WASH. L. REV. 580, 583-86 (1960). For a detailed analysis and proposed solution to the problem of recre-

spread filling and building over lake beds is still too recent a phenomenon for much case law to have developed; and, despite the quickening pace of such encroachments, and the increasing publicity given to the problem,[3] urban planners and other officials have not yet taken the necessary remedial action.[4] This lack of any articulated legal thinking on the topic, and our belief that regulation of lake surface invasions must begin soon, if it is ever to succeed, prompted us to investigate the problem. Here we will attempt to identify the more important issues and to suggest possible solutions.

Our primary focus is on small natural lakes,[5] that are nonnavigable for title.[6] Restriction of our discussion to lakes, of course, excludes

ational use see Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542 (1958).

The reader interested in these traditional water use problems may consult other pieces previously appearing in this *Review*. Corker and Roe, *Washington's New Water Rights Law—Improvements Needed*, 44 WASH. L. REV. 85 (1968); Note, *The Tale of Two Lakes—A New Chapter in Washington Water Law*, 43 WASH. L. REV. 475 (1967); Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580 (1960); Morris, *Washington Water Rights—A Sketch*, 31 WASH. L. REV. 243 (1956); Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 WASH. L. REV. 197 (1932).

[3] For an example of the increasing press attention being given to the problem of filling and building on water surfaces see the article on fills on navigable Lake Chelan in The Seattle Times, Jan. 4, 1970, § D, at 1, Col. 1.

[4] In correspondence with a number of West and Mid-West cities and counties over the summer and fall of 1968, we found that none had as yet initiated serious study on the control of small privately owned lakes. Several of the cities, however, had achieved an early and permanent solution by acquisition of title to the lake beds and surrounding upland for park purposes—notably Minneapolis and St. Louis.

[5] Our concern is with lakes and not with rivers. In many instances the law appears to be generally the same for both types of water bodies. However, factual differences between lakes and streams, and the way people use them, cause different types of problems to arise. For example, on lakes there is ordinarily no strong flow of water, and thus no physical or hydrological necessity for a channel. A lake, especially a small one, can be completely filled in, or at least significantly changed by fills and structures. Ordinarily on rivers the danger of floods and the shifting of channels is sufficient to keep homeowners from building too close to them. This is not true as to lakes. Lakes are also usually safer for recreational activities because of the lack of current. Lakes, in general, have a considerably different appearance and provide a different aesthetic value than do streams. All of these factors, we believe, justify separate treatment of lake problems, at least in the content of the conflict between filling and building and other water uses.

[6] As used in this article "navigability," unless otherwise specified, means navigability for title in the federal sense as defined in United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); and United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). For a full discussion of the various concepts of navigability see Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NATURAL RESOURCES J. 1, 8-33 (1967) [hereinafter cited as Johnson & Austin]. In that article the authors summarized their analysis of the title navigability cases by observing that

> . . . navigability for title should be considered separately from navigability for commerce clause or other purposes.
>
> There are four criteria for navigability for title:

water bodies too small to be labeled "lakes." No hard and fast definition of "lake" can be derived from the case law, but, intuitively, it is clear, that at some point, a water body will be obviously so small, shallow, or useless, that the established rules of lake law will not be applied.[7] The term "natural" also excludes artificial lakes, which present peculiar problems not necessarily resolvable in the natural lake context.[8] We have examined primarily cases dealing with small non-

(1) Navigability for title is determined as of the date each state came into the Union.

(2) Such navigability is determined by the natural and ordinary condition of the water at that time, not whether it could be made navigable by artificial improvements. However, the fact that rapids, rocks, or other obstructions make navigation difficult will not destroy title navigability so long as the waters were usable for a significant portion of the time.

(3) Navigability in intrastate commerce is all that is required, not usability in interstate commerce.

(4) The waters must be usable by the "customary modes of trade or travel on water." This may include waters usable for commercial log floating. This includes waters as little as three or four feet deep that are geographically located so they have been, or can be used by canoes and rowboats for commercial trade and travel (fur traders' canoes). This does not include waters which are difficult of access because of surrounding mud flats or the like, *and* which are geographically isolated from habitation and transportation routes, *and* which have never been and are not likely to be used for commercial trade or travel. This probably does not include waters that are geographically isolated from habitation and transportation routes and which have never been and are not likely to be used for commercial trade or travel, even though these waters are deep enough and large enough to float commercial type vessels, and are not physically inaccessible because of mud flats or the like.

Johnson & Austin, *supra* at 24-25.

[7] The Minnesota Supreme Court has provided what seems to be a reasonable definition of the problem and a suggested criterion:

> It does not follow that the foregoing riparian rights rule applies to every pothole or swamp frequented by wild fowl and over which a small boat might be poled to retrieve game, but which as a practical matter does not lend itself in any substantial degree to the customary propulsion of boats by outboard motors or oars. A minor body of water which by its very nature and character reasonably has no overall utility common to two or more abutting owners would fall outside the rule. No hard-and-fast line can be drawn and each case must be determined according to its own peculiar facts.

Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689, 697 (1960). The court was addressing itself to the scope of the rule of common use which it was adopting, but, given our aim to draw a distinction on the basis of water bodies which do not possess the customary water law incidents, the language is most appropriate for present purposes.

[8] The general rule as to artificial water bodies, including lakes, is that their beds may be used as if dry land, and that abutting land owners have no riparian rights. *See, e.g.*, Brasher v. Gibson, 101 Ariz. 326, 419 P.2d 505, 509 (1966); Kray v. Muggli, 84 Minn. 90, 86 N.W. 882 (1901). For general treatment and citation of authorities on artificial water bodies see Evans, *Riparian Rights in Artificial Lakes and Streams*, 16 Mo. L. Rev. 93 (1951); Murphy, *A Short Course on Water Law for the Eastern United States*, 1961 Wash. U.L.Q. 93, 117-20 (1961); VI-A American Law of Property, § 28.55, at 157 n.8 (A. Casner ed. 1954).

Rights of use similar to those on natural lakes may be obtained, however, in various ways. *E.g.*, Greisinger v. Klinhart, 321 Mo. 86, 9 S.W.2d 978 (1928) (reciprocal ease-

navigable lakes; however, some of the same considerations are relevant to "navigable" lakes as well.[9] That this is so is illustrated by the recent Washington decision in *Wilbour v. Gallagher*,[10] where the supreme court required removal of a fill on a privately-owned portion of the bed of navigable Lake Chelan.[11] This case plainly suggests that the "navigability" *vel non* of a lake for title purposes may, in the future, play a less important role in the field of lake law than it has in the past.[12] Nevertheless, the traditional differential treatment[13] ac-

ments arising out of severance of common tract on which the entire artificial lake was located); Wilson v. Owen, 261 S.W.2d 19 (Mo. 1953) (plat dedication); Bradley v. County of Jackson, 347 S.W.2d 683 (Mo. 1961) (deed reservation); Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners' Ass'n, 225 So. 2d 557 (Fla. App. 1969) (per curiam) (home owners' association).

The Washington Supreme Court has also recently accorded equality of treatment to the natural and artificial water levels of navigable Lake Chelan, Washington. Wilbour v. Gallagher, 77 Wash. Dec. 2d 307, 314-17, 462 P.2d 232, 237-39 (1969). This case is discussed in Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 651 (1970) [hereinafter cited as Corker].

[9] The problems of filling and building on navigable for title lakes and salt water bodies is discussed in another article appearing in this issue of the *Review*. Corker, *supra* note 8.

[10] 77 Wash. Dec. 2d 307, 462 P.2d 232 (1969). The case is extensively treated in Corker, *supra* note 8.

[11] The fill was ordered to be removed on the grounds that it interfered with the public right of navigation ". . . together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." Wilbour v. Gallagher, 77 Wash. Dec. 2d at 317, 462 P.2d at 239. In Bach v. Sarich, 74 Wn. 2d 575, 445 P.2d 648 (1968), an apartment building extending over the surface of a nonnavigable lake was ordered to be removed on a similar ground *i.e.* interference with common rights of riparian owners to boat, fish, and swim over the entire surface of the lake. *Bach* was not cited in *Wilbour*, however. The *Bach* case is discussed at notes 14-18, 65-67 and accompanying text *infra*.

[12] Analytically, as pointed out in Corker, *supra* note 8, there are sound arguments to support this view. For a brief comment on the historical trend in the State of Washington towards equal treatment of navigable and nonnavigable lakes as to filling and building see note 13 *infra*.

[13] Illustrative of such a difference in treatment is that riparian owners on nonnavigable lakes, until recent decisions to the contrary, have generally been permitted to build structures of various types on their privately owned lake beds. Riparians on navigable lakes, however, lacking bed title, have ordinarily been restricted to structural uses which are deemed riparian, the most common being the right to wharf out to the line of navigability. *See, e.g.*, Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915). If, however, the navigable lake riparian did acquire title to the bed, his structural use rights became comparable to the nonnavigable riparian's. Ironically, the recent developments of increased alienation of the beds of navigable lakes and the judicial restriction of nonnavigable filling and building rights in the case of Bach v. Sarich, 74 Wn. 2d 575, 445 P.2d 648 (1968), forecast a situation in reverse of the original, one in which the navigable riparian would have greater filling and building rights than the nonnavigable riparian.

The Washington situation is particularly interesting. Prior to *Bach*, *supra*, riparians on nonnavigable lakes assumedly could fill and build as they pleased owing to their ownership of the bed. However, land owners abutting navigable lakes not only did not have bed title, but also lacked riparian rights due to the decision in Eisenbach v. Hatfield, 2 Wash. 236, 253, 26 P. 539 (1891), which held that under the Washington Con-

corded to navigable and nonnavigable lakes does persist, and this article will center on the nonnavigable lakes.

A recent Washington decision illustrates many of the considerations which we wish to examine here and reveals one court's resolution of these problems. In *Bach v. Sarich*,[14] defendants sought to construct an apartment building over the surface of Bitter Lake on a portion of the bed which they owned. The apartment would have extended from the upland on to fill and then on to a pier, to a total distance of about 180 feet from shore. Bitter Lake is a small, 19 acre, nonnavigable lake in Seattle. Plaintiffs were riparian owners on the lake who sought to enjoin defendants from constructing the apartment building; they argued that the common right of use held by riparians[15] created an easement-type interest over the whole lake surface and that defendants thus had no right to build an apartment over *any* portion of the lake bed.

The trial court ruled for plaintiffs, holding that their common right of use extended over the whole lake, and enjoined defendants from building their apartment over any portion of the lake. The Washington Supreme Court affirmed in an opinion establishing a new and significant rule of law.

Defendants had argued that, as riparian owners holding title to both the bank and the bed under the proposed apartment site, they had a "riparian right" to make use of the lake overlying their portion of the bed. They contended that this right was limited only by the

stitution no riparian rights attached to ownership of lands bordering on navigable waters. Thus, the navigable abutter could not even erect riparian structures such as wharves. In part to ameliorate the harshness of this decision, the state began selling the beds of navigable waters to upland owners, giving the owners rights to erect structures without any limit to riparian uses. At this point upland owners on both navigable and nonnavigable lakes had effectually unlimited building rights on their lake beds. Then along came *Bach*, *supra*, which restricted riparians on nonnavigable lakes to riparian structural uses, giving rise to the ironic reversal mentioned in the last paragraph. The final step came in Wilbour v. Gallagher, 77 Wash. Dec. 2d 307, 462 P.2d 239 (1969) in which it was held that at least all fills and structures not affirmatively authorized by zoning ordinances or harbor lines were impermissable interferences with a public right of navigation. Thus, at least to some extent, navigable and nonnavigable upland owners are back at parity, but this time with equally limited rights to fill and build as opposed to equally unlimited ones.

[14] 74 Wn. 2d 575, 445 P.2d 648 (1968).

[15] Under a rule of common use, each riparian owner on a nonnavigable lake has a right in common to use the entire surface of the lake. Washington had adhered to the rule in an earlier case, Snively v. Jaber, 48 Wn. 2d 815, 296 P.2d 1015 (1956). The right is categorized in the opinions as one of property, apparently in the nature of an easement, although the character of the interest has never been precisely defined. The rule is discussed at text accompanying notes 28-45 *infra*.

concept of "reasonableness," and that their structure was "reasonable" under the circumstances. Defendants further asserted that the issue of reasonableness had been foreclosed in their favor by the enactment of a zoning ordinance designating their portion of the bed for apartment use; this ordinance constituting a legislative determination that an apartment was a reasonable use of the lake bed.

The Washington Supreme Court rejected this argument, stating that the proposed apartment was not a "riparian" use at all and that, therefore, under no condition could it be considered "reasonable." Furthermore, because the apartment was not a riparian use, said the court, it could not be built over *any* portion of the lake bed. The court explained:[16]

> Mere proximity of the apartment to the water does not render it a riparian use. With respect to a structure, such a use must be so intimately associated with the water that apart from the water its utility would be seriously impaired. . . . The utility of the apartment is in no way dependent upon the waters of Bitter Lake, and its utility as an apartment would be in no way impaired apart from this lake.

Although the court did not explicitly say so, it seems clear that this rule would not *per se* bar construction of docks, piers, or even boat marinas on a lake. Such uses would be "riparian" and controlled by the rule of "reasonableness."[17]

The court also rejected the defendants zoning argument, saying that although the city ". . . might regulate the exercise of [plaintiffs' riparian rights to boat, fish, and swim, etc.] by means of its police power, it may not totally divest plaintiffs of them through the mechanism of zoning."[18]

[16] 74 Wn. 2d at 579-80, 445 P.2d at 651.
[17] Discussed in text accompanying notes 51-64 *infra.*
[18] 74 Wn. 2d at 580, 445 P.2d at 652.
The court was also convinced that the zoning of the lake in the case was inadvertant and that the city of Seattle had never actually thought about the specific question of construction on the lake bed or how zoning might affect that question.
A number of other issues were also raised in the case, having to do with adverse possession, laches, hardship, and good faith, but these issues are not relevant to our present discussion. However, one of the principal issues was whether the defendant-builders should be able to keep their apartment in place in view of the fact that most of the actual construction had occurred after a motion for preliminary injunction to halt construction had been dismissed, but before the main trial. The court declined to hold that the defendants were in bad faith, but nonetheless felt that they had proceeded with knowledge that a court decision might go against them and thus took the chance that a court might order removal of the structure. The loss to the defendants through removal was alleged to be about $250,000.00.

The effect of this decision is to effectively and permanently "zone" the *total* surface areas of *all nonnavigable lakes* in the State of Washington for "water-related" uses only. No homes, apartments, businesses (unless location on the lake is essential to their operation, such as boat marinas), or other activities not "intimately associated with the water" may be conducted on fills or piers over the waters of these lakes. Presumably, this rule would also bar any fill designed to increase the size of a yard, parking lot, driveway, or whatever, where the use to be made of the filled area is not "intimately associated with the water."

A search of authorities in other jurisdictions has revealed no other case in the nation like this one, and only a few that are closely related.[19] This dearth of authority seems surprising in view of the present competition for lake surface use rights between recreationists, builders, and homeowners.[20] But the present rate of metropolitan population growth and geographic expansion will doubtless intensify this competition and increase the probability of litigation on this subject. With this in mind, we have structured our following discussion to consider, first, judicial limitations on filling and building over nonnavigable lake surfaces, and, second, possible legislative solutions.

I. JUDICIAL LIMITATIONS ON FILLING AND BUILDING ON NONNAVIGABLE LAKE BEDS

The competition between recreationists and developers for the use of nonnavigable lake surfaces has generally revolved around the central conflict between property rights derived from ownership of

[19] The only other case directly centered on the issue of fills and buildings over nonnavigable lake surfaces is Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117 (1946), and that case involved filling only. *See* discussion notes 68-73 and accompanying text *infra*. Another case involved in part a dirt fill designed to fence off a neighboring riparian from use of a nonnavigable lake surface. Duval v. Thomas, 114 So. 2d 791 (Fla. 1959), *aff'g* 107 So. 2d 148 (Fla. Dist. Ct. App. 1958). Profitably comparable is the recent Washington case involving fills in navigable lake waters. Wilbour v. Gallagher, 77 Wash. Dec. 2d 307, 462 P.2d 232 (1969). The case is discussed in Corker, *supra* note 8.

[20] A partial explanation for the absence of additional decisions is that many cities have reserved all or some of their lakes for public parks, preventing private development. St. Louis and Minneapolis are examples. A further reason is that many jurisdictions in the populous Eastern United States grant the nonnavigable lake bed owner an exclusive use of his bed and the overlying waters, leaving the recreational riparian without grounds to protest fills and buildings placed on privately-owned lake beds. *See* note 23 and accompanying text *infra*.

lake bottoms and riparian rights to recreational use stemming from ownership of lake front property (and, in some jurisdictions, the public's right of navigation stemming from public access to the lake). This central controversy, which is our primary concern in this article, can arise only when two conditions exist: (1) lake beds in private ownership; and (2) a riparian or public right to use the entire lake surface for recreational purposes. Thus, we do not purport to deal with the situation in those states (such as Wisconsin) where title to lake beds is held "in trust" by the state for all the people,[21] nor the situation in the "Great Pond" jurisdictions (such as Massachusetts, Maine, and New Hampshire) where most lake beds are reserved for public ownership.[22] We have also excluded from our consideration the so-called "eastern" or common law jurisdictions in which the owner of a portion of a nonnavigable lake bed has an exclusive right to use the bed and the waters overlying it. Under this strict property concept, other riparians and members of the general public have no right to use waters overlying privately-owned beds, and they may be excluded

[21] It has been long-settled in Wisconsin that the beds of navigable *for use* lakes up to ordinary high water mark are held in trust for the people by the state, although the owner of land abutting a stream has a qualified title to the bed to the thread of the stream. Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 N.W. 855, 856-57 (1901); Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N.W. 661 (1897). For more recent discussion *see* Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514, 517 (1952); Baker v. Voss, 217 Wis. 550, 259 N.W. 413 (1935). Wisconsin's test of navigability for use would appear to be less stringent than the federal test, requiring only that a "sawlog" or a "shallow draft boat" be able to float on a stream or lake surface. *Muench, supra*, 53 N.W.2d at 516-21. *See* Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335, 337-40 (1958). Technically, Wisconsin would thus appear to be claiming ownership of lake beds which under the federal test (*see* note 6 *supra*) should have passed into private ownership. Wisconsin does allow some fills and buildings on state beds under a permit system. WIS. STAT. ANN. §§ 30.11-.13 (1964, Supp. 1969).

In Iowa a rather unusual situation exists as to the beds of meandered, but nonnavigable lakes, which under Iowa law are apparently considered to have remained under the control of the federal government at statehood and not to have passed into private ownership. Nonnavigable unmeandered lakes, however, are deemed to have passed into private ownership. Note, *Fishing and Recreational Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322, 1328-30 (1968).

[22] In some New England states any lake containing more than 10 acres (in some cases 20 acres) is considered a "Great Pond," the bed of which is reserved for public ownership. The root of this doctrine is the Massachusetts Bay Colony, Colonial Ordinance of 1641-47, either as legislation or as a matter of common law adoption. However, an abutting land owner has been said to have ". . . the right to build wharves and other structures into the pond for his own use, to an extent that would not unreasonably interfere with the right of the public in the pond." Dolbeer v. Suncook Waterworks Co., 72 N.H. 562, 58 A. 504, 506 (1904) (dictum). *See* Musgrove v. Cicco, 96 N.H. 141, 71 A.2d 495, 496 (1950). For a general discussion relative to Massachusetts and Maine see M. FRANKEL, LAW OF SEASHORE, WATERS AND WATER COURSES: MAINE AND MASSACHUSETTS 106-122 (1969).

by fencing. Thus, in these Eastern States, the bed owner can fill or build as he pleases.[23] A similar rule apparently prevails in those arid Western States, which do not recognize either riparian rights or a public navigation easement over nonnavigable waters.[24]

By elimination, we will therefore emphasize the situation in only those jurisdictions (mainly western) which recognize private ownership of nonnavigable lake beds and also afford riparians (and possibly the public generally) common rights to use the whole surface of nonnavigable lakes for recreational purposes. In these jurisdictions, title to the bed of a nonnavigable lake may be derived from a specific point-and-line deed grant, or from a presumption that a conveyance of the upland also transfers ownership of the bed to the center of the lake.[25] Riparian rights, on the other hand, generally accrue from ownership of the upland alone.[26] Although some jurisdictions require ownership of a portion of the bed,[27] this requirement will be immaterial

[23] For cases representative of the eastern rule *see, e.g.*, Baker v. Normanach Ass'n, 25 N.J. 407, 136 A.2d 645 (1957); Miller v. Lutheran Conference Camp Ass'n, 331 Pa. 241, 200 A. 646, 649-50 (1938) (artificial lake, but court dealt with as if natural); Commonwealth Water Co. v. Brunner, 175 App. Div. 153, 161 N.Y.S. 794, 798 (1916); Lembeck v. Nye, 47 Ohio St. 336, 24 N.E. 686 (1890). Rights to use the waters over the private bed in an eastern rule jurisdiction can be acquired by deed or contract. *See, e.g.*, Sheahan v. Upper Greenwood Lake Property Owners' Ass'n, 36 N.J. Super 133, 115 A.2d 129 (1955) (deed covenant). For a good brief comparison of this common law rule and the opposing civil or "common use" rule see Note, *Extent of Private Rights in Non-Navigable Lakes*, 5 U. FLA. L. REV. 166, 176-78 (1952).

[24] *See, e.g.*, Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905); Herrin v. Sutherland, 74 Mont. 587, 241 P. 328 (1925) (both cases involved nonnavigable streams, however). *See also* cases cited Johnson and Austin, *supra* note 6, at 44-45. As to Colorado, for an argument for recreational rights on an appropriation theory see Note, *Water for Recreation: A Plea for Recognition*, 44 DENVER L.J. 288 (1967).

[25] *See, e.g.*, Bauman v. Barendregt, 251 Mich. 67, 231 N.W. 70, 71 (1930). The rule has been called one of "almost universal recognition." 1 WATERS AND WATER RIGHTS § 41.3(A) (R. Clark ed. 1967). For additional cases *see id.* at 261 n.87. For a general treatment see Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940).

[26] *See, e.g.*, Bach v. Sarich, 74 Wn. 2d 575, 579, 445 P.2d 648, 651 (1968); Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689, 694 (1960); Bradley v. County of Jackson, 347 S.W.2d 683, 688 (Mo. 1961) (artificial lake); Morris, *Washington Water Rights—A Sketch*, 31 WASH. L. REV. 243, 244 (1956). Riparian rights are also presumed incident to upland ownership in Wisconsin, but there by necessity given public ownership of lake beds. *See* Mayer v. Grueber, 29 Wis. 2d 168, 138 N.W.2d 197, 203 (1965). Recognition of the civil law rule of common use has been said to necessarily imply that riparian recreational rights are derived from shore rather than bed ownership. Note, *Fishing and Recreational Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322, 1343 (1968).

[27] *See, e.g.*, Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738, 744, *as modified* 180 Neb. 569, 144 N.W.2d 209 (1966) (stream). Experts on Florida lake law have commented that ". . . the concept of riparian rights accruing to an individual by ownership of the land abutting on a navigable lake has no applicability to the nonnavigable lake," indicating that bed ownership is requisite in Florida to riparian rights on nonnavigable

in the ordinary case in which the upland owner will own a portion of the bed as well.

It is difficult to generalize about the nature of riparian rights,[28] since they are established by highly diverse local law which each state determines for itself.[29] Riparian rights have been described as "vested property interests,"[30] and they include at least the rights to use water for irrigation, consumption, fishing, boating, hunting, swimming and similar domestic and recreational uses.[31] Additionally, in the "common use" jurisdictions (with which we are primarily concerned), these riparian rights may be exercised over the entire surface of the nonnavigable lake, not just in waters overlying one's own bed as is the case in the eastern jurisdictions mentioned above.[32]

The "common use," or civil law, rule[33] is enjoying increasing acceptance; to date it has been adopted in Michigan,[34] Minnesota,[35] Missouri,[36] Arkansas,[37] Washington,[38] Florida,[39] Mississippi,[40] and, as

lakes. Maloney & Plager, *Florida's Lakes: Problems in a Water Paradise*, 13 U. FLA. L. REV. 1, 68 (1960) [hereinafter cited as Maloney & Plager].

[28] The word "riparian" carries no magical meaning. It is merely a shorthand way of describing those rights which the law recognizes as being held by the owner of land adjacent to water.

[29] *See* Hardin v. Jordan, 140 U.S. 371, 382-83 (1891).

[30] *See, e.g.*, Bach v. Sarich, 74 Wn. 2d 575, 579, 445 P.2d 648, 651 (1968); *In re* Clinton Water District, 36 Wn. 2d 284, 287, 218 P.2d 309, 312 (1950); Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571, 575 (1956); Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.2d 174, 179 (1944).

[31] Such a listing fairly comports with the uses alluded to in the leading riparian right of common use cases of Bach v. Sarich, 74 Wn. 2d 575, 579, 445 P.2d 648, 651 (1968), and Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689, 696-97 (1960). Contrast Munninghoff v. Wisconsin Conservation Commission, 255 Wis. 252, 38 N.W.2d 712, 715-16 (1949) which, although generally recognizing the above uses, specifically rejected muskrat trapping as an incident of the public right of navigation, calling it instead an "incident of land use." To the rights listed in the text should be added the right to access to the water and construction of a dock to facilitate that access.

[32] *See* note 23 and accompanying text *supra*.

[33] For general discussion of the rule of common use consult Comment, *Water Recreation—Public Use of "Private" Waters*, 52 CALIF. L. REV. 171 (1964); Johnson & Austin, *supra* note 6, at 41-52; Note, *Extent of Private Rights in Non-navigable Lakes*, 5 U. FLA. L. REV. 166, 176-78 (1952).

[34] Beach v. Hayner, 207 Mich. 93, 173 N.W. 487, 489 (1919); Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117, 120 (1946).

[35] Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689, 696-97 (1960).

[36] Missouri is included as a common use jurisdiction not on the basis of a specific holding as to a nonnavigable lake, but rather on the strength of several closely analagous opinions. Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954) (nonnavigable stream); Greisinger v. Klinhart, 321 Mo. 186, 9 S.W.2d 978, 983 (1928); Mueller v. Klinhart, 167 S.W.2d 670 (Mo. Ct. App. 1942) (latter cases dealt with an artificial lake). *See also* Luesse v. Weber, 350 S.W.2d 424, 430 (Mo. Ct. App. 1961); Sneed v. Weber, 307 S.W.2d 681 (Mo. Ct. App. 1957).

[37] Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 134 (1955) (by implication).

[38] Snively v. Jaber, 48 Wn. 2d 815, 821-22, 296 P.2d 1015, 1019, 57 A.L.R.2d 560

to unsurveyed lake beds, in Virginia[41] and possibly Texas.[42] Some jurisdictions have achieved similar results by recognizing a public easement of navigation and recreation over nonnavigable waters, despite private ownership of the bed.[43] Still other states, as we read their existing case law, might well adopt the common use rule if the issue arose.[44]

Some of these "common use" states have also extended full surface use rights to members of the general public who are able to gain access to the water without trespass.[45] Making the public surface use right

(1956); Bach v. Sarich, 74 Wn. 2d 575, 580, 445 P.2d 648, 651-52 (1968). *Cf.* Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900) permitting fencing of unmeandered stream.

[40] Duval v. Thomas, 114 So. 2d 791, 795 (Fla. 1959), *aff'g* 107 So. 2d 148 (Fla. Dist. Ct. App. 1958); Florio v. State *ex rel.* Epperson, 119 So. 2d 305, 310 (Fla. Dist. Ct. App. 1960).

[41] State Game and Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940). The case affirmed an injunction against the user by reason of equal division as to statutory authority, but a majority of the court voted for a right of common use.

[42] In Improved Realty Co. v. Sowers, 195 Va. 317, 78 S.E.2d 588, 592 (1953), Virginia adopted the rule of common use without apparent exception, but later in Wickouski v. Swift, 203 Va. 467, 124 S.E.2d 892, 894-95 (1962) the Virginia court held the rule inapplicable to a nonnavigable fishing pond, the bed of which was divided by distinguishable boundary lines as opposed to the unsurveyed bed in *Improved Realty, supra.* Washington explicitly rejected such a distinction in Judd v. Bernard, 49 Wn. 2d 619, 622, 304 P.2d 1046, 1049 (1956). *See also* Boerner v. McCallister, 197 Va. 169, 89 S.E.2d 23 (1955) in which the bed owner was held to have an exclusive right of fishery in the waters of a nonnavigable stream overlying his bed.

[43] In Taylor Fishing Club v. Hammet, 88 S.W.2d 127 (Tex. Civ. App. 1935), the court ruled that when bed ownership is based on surveyed boundaries, the bed owner has an exclusive right of use of the overlying water, but indicated in dictum that common use might apply when bed ownership was based solely on upland ownership without surveyed boundaries. *Id.* at 130.

[44] In both Day v. Armstrong, 362 P.2d 137, 147 (Wyo. 1961) (nonnavigable stream) and State *ex rel.* State Game Comm'n v. Red River Valley, 51 N.M. 207, 182 P.2d 421 (1945) (lake formed by damming of navigable river), this public right of navigation with incidental recreational rights, such as boating and fishing, was grounded in part on a state constitutional declaration of public ownership of waters. Missouri can also be placed in the public easement of navigation category by virtue of Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954) (nonnavigable stream). Oklahoma has just recently declared such a public easement on a nonnavigable stream. Curry v. Hill, 460 P.2d 933, 935-36 (Okla. 1969).

[45] Oregon has indicated its preference for a rule of common use by dictum in Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158, 1162 (1936).

California affords some right of public use of waters overlying private beds. *Compare* Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951) *and* Forrestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912) *with* Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907). The conclusion of one California commentator was that ". . . in addition to being boatable it would seem that a body of water must be useful as a public passage for a public right of navigation to exist . . . ." Comment, *Water Recreation—Public Use of "Private" Waters,* 52 CALIF. L. REV. 171, 180 (1964).

An early Idaho decision also permitted use of waters overlying a private stream bed. Johnson v. Johnson, 14 Idaho 561, 95 P. 499 (1908) (navigable stream, but bed held to be privately-owned under state title test).

[46] Examples are Minnesota, which recognizes a public right of use as to all lakes

coextensive with the riparian right, however, is not critical to our analysis; for so long as someone, whether he be a member of the public or a riparian, has a right to use the surface of a nonnavigable lake over privately-owned beds, the conflict that we wish to examine is present.

In any common use jurisdiction, the right of the riparian and/or the public to use a lake's entire surface for boating, fishing, and swimming, etc., is necessarily in conflict with any unrestrained right in the bed owner to fill or build on his submerged property. Wherever the riparian can literally use the *entire* lake surface, any fill or structure at all would violate his right. On the other hand, if each bed owner can fill and build without restriction, the lake surface could be consumed and recreational use could become impractical, if not impossible. No doubt the easiest way to dispose of such a conflict would be to permit one or the other of these competing users an *exclusive* right to use the lake surface. This is exactly what has been done in the "eastern" (common law) rule states and in some of the arid Western States,[46] where the bed owner has the exclusive right. On the other hand, the public is given a generally exclusive preference in the "Great Pond" states and in "trust" states (such as Wisconsin),[47] where private ownership of lake beds is not ordinarily permitted. From the outset, however, we have rejected such all-or-nothing answers; instead, we seek a rule of reconciliation. Given our choice, the language of Judge O'Brien in *Hedges v. West Shore Railroad Co.* is most apt:[48]

capable of "substantial beneficial use"—at least when the state as riparian provides access—Flynn v. Beisel, 257 Minn. 531, 102 N.W.2d 284, 290-91 (1960), Bartlett v. Stalker Lake Sportsmen's Club, — Minn. —, 168 N.W.2d 356, 360 (1969); and State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699, 706 (1963) (dictum), and Michigan, which permits public use of all "boatable" lakes, Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748, 752 (1957):

> So long as boatable waters stand or flow in the upper reaches of this inland lake *people having lawful access* to such waters may boat upon and fish in the same provided they trespass not on fast and privately held lands. (emphasis added.)

Collins v. Gehrhardt, 237 Mich. 38, 49, 211 N.W. 115, 118 (1925) (stream). Those jurisdictions which recognize a public easement of navigation over privately-owned beds may also be included in this category. *See* note 43 *supra.* Note also the California decisions listed in note 44 *supra.*

[46] *See* notes 23-24 and accompanying text *supra.*

[47] It must be noted that both in the Great Pond states and in Wisconsin, some filling and building by the upland owner is permitted, despite public ownership of the lake beds. *See* notes 21-22 and accompanying text *supra.*

[48] 150 N.Y. 150, 44 N.E. 691, 693 (1896). The case involved a riparians' complaint that

> Where two such rights or interests exist, with respect to the same portion of the earth's surface, each must be exercised and enjoyed in a reasonable way. Each right or interest in such a case is always subject to the qualification that it cannot be exercised or enjoyed in such a way as to destroy the other.

Only two courts have expressly discussed this conflict between lake fills and buildings and riparian recreational rights; these two decisions are *Bach v. Sarich*,[49] and a 1946 Michigan case, *Burt v. Munger*.[50] In such a refreshing absence of fixed thinking, we have been able to perceive two judicial mechanisms which seem well-adapted to resolution of disputes of this kind: (1) the test of "reasonable use," developed under the riparian rights doctrine; and (2) the riparian-versus-non-riparian use test applied by the Washington Supreme Court in *Bach v. Sarich* (also referred to as the "water-related" use test).

A. The Reasonableness Test as Stated in the Riparian Rights Doctrine

The riparian rights principle has been adopted to some extent in nearly all the states of the nation (excluding those states in the arid West which rely exclusively on the appropriation system: Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona, and New Mexico). Although the riparian states vary considerably in their application of the doctrine of riparian rights, a majority adhere to a "reasonable use" rule in determining priorities among competing users.[51] "Reasonableness" has long been employed as a limitation on the exercise of rights to consumptive uses,[52] and has been adopted more recently as a restriction on recreational uses as well.[53] But it has never been explicitly

their right of access to a navigable river had been unlawfully interfered with by the railroad company's bridge. The court, however, held otherwise.

[49] 74 Wn. 2d 575, 445 P.2d 648 (1968). Discussed in text accompanying notes 14-18 *supra* and 65-67 *infra*.

[50] 314 Mich. 659, 23 N.W.2d 117 (1946). This case involved fills only. *See* discussion in text accompanying notes 68-73 *infra*.

[51] 1 WATERS AND WATER RIGHTS § 51.3 (R. Clark ed. 1967). A minority purport to follow a natural flow theory. *Id.* For a discussion of Washington law in general (in which incidentally the authors suggest that the natural flow theory is no longer the law anywhere, and has not been since water requirements outran water supply) see Corker & Roe, *Washington's New Water Rights Law*, 44 WASH. L. REV. 85 (1968).

[52] *See, e.g.*, Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955); Lake Gibson Land Co. v. Lester, 102 So. 2d 833 (Fla. Dist. Ct. App. 1958) (cases involving conflicts between a riparian desiring to draw out water for irrigation and a riparian protesting that the lowering of the water level interfered with recreational uses).

[53] *See, e.g.*, Botton v. State, 69 Wn. 2d 751, 420 P.2d 352 (1966); Ames Lake Commu- *ex rel.* Epperson, 119 So.2d 305 (Fla. Dist. Ct. App. 1960) (cases involving conflicts among riparian recreational users and their licensees).

applied to either authorize or prohibit fill or structural use of a nonnavigable lake.

No single analytical approach is apparent in the opinions which apply the "reasonable use" test. It is generally agreed, however, that the reasonableness of a particular use is a question of fact, which depends upon the particular circumstances of each case. The *Restatement of Torts* § 852 (1939), in its treatment of consumptive uses, recommends balancing the "utility of the use" against the "gravity of the harm."[54] In *Thompson v. Enz*,[55] a recent case involving both recreational and appropriative uses, the Supreme Court of Michigan outlined a three step procedure to be followed when determining the "reasonableness" of a proposed use: first, ascertain the nature of the lake; second, assess the character and degree of the use itself; and third, evaluate the consequential effects, including benefits and detriments, on the interests of other riparians and those of the state as trustee for the general public.[56] Under either of these approaches, all relevant factors must be considered; for example, in the case of a fill or a building, the court would have to consider how far the development extends into the water, how much area of the lake is covered, what uses will be made of the fill or structure, what effects it will have on fish life, boating, and the view of other riparians, etc. A building or fill which encompasses so much of the lake surface area as to render recreational use impractical would clearly be unreasonable;[57] similarly unreasonable would be a fence preventing access to the waters overlying a significant portion of the bed.[58] But, on the other hand, an assertion of a right to boat or swim over literally the *entire* lake surface, so no fill or building could be constructed, would

[54] RESTATEMENT OF TORTS §§ 853, 854 (1939) lists various factors to be considered in evaluating the "utility of the use" and the "gravity of the harm" respectively.

[55] 379 Mich. 667, 154 N.W.2d 473, 484-85 (1967).

[56] Assumedly, the interests of the state as trustee for the public would not have to be weighed in a jurisdiction which, unlike Michigan, has not recognized a public right to use nonnavigable lake surfaces in common with riparians.

[57] As previously mentioned, no case has arisen in which a fill or a building has been held unreasonable, but analogously a fence was ordered to be removed as unreasonable in Duval v. Thomas, 114 So. 2d 791 (Fla. 1959), *aff'g* 107 So. 2d 148 (Fla. Dist. Ct. App. 1958), and draining a lake so as to interfere with recreational uses has been enjoined as unreasonable, Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.2d 174, 182-83 (1944), and cases cited in note 52 *supra*.

[58] *See, e.g.*, Duval v. Thomas, 114 So. 2d 791 (Fla. 1959), *aff'g* 107 So. 2d 148 (Fla. Dist. Ct. App. 1958).

also be unreasonable. Between these extremes, "reasonableness" will depend on the particular facts and circumstances of each case.

Since, between obvious polar cases, a given use cannot be assuredly reasonable or unreasonable until litigation has resolved the issue, the application of a test of "reasonableness" sacrifices much of the certainty and predictability[59] which prevails under the "exclusive rights" solutions of some states. Yet, the overriding virtue of the "reasonableness" test is its capacity for full consideration of competing interests and uses, disregarding rigid preferences and permitting a pragmatic assessment of the most desirable water uses.

A critical point is that under the "reasonable use" test, no type of use—not even a non-riparian use—is necessarily unreasonable per se.[60] Most "common use" cases speak solely in terms of reasonableness, giving no indication that some specific type of use might be per se unreasonable.[61] Thus, under the "reasonable use" test, a non-riparian use, such as an apartment building, could be considered reasonable; but note that under the "riparian use" test of *Bach v. Sarich*,[62] an apartment building which extends only a few feet over the lake surface would be enjoinable as a non-riparian use. It must be pointed out, however, that these "reasonableness" common use cases involved clearly riparian uses such as boating and fishing, rather than possibly non-riparian uses such as structures or fills, thus rendering an interpretation of their rationale as strictly one of "reasonableness" conjectural at best.[63]

[59] *See* RESTATEMENT OF TORTS, ch. 41, Topic 3, Scope Note, at 345-46 (1939).

[60] The non-riparian character of the use, however, would be a factor in the analysis, one weighing against a determination of reasonableness. RESTATEMENT OF TORTS § 855 and comment a (1939). Even as to consumptive uses, some states adhering to the "reasonableness" test had crystalized the doctrine into one heavily preferring riparian over non-riparian uses. *Id.*, comment b.

[61] *See, e.g.*, Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689, 697 (1960):

> . . . provided such is reasonable and does not unduly interfere with the exercise of similar rights on the part of abutting owners.

Duval v. Thomas, 114 So. 2d 791, 794 (Fla. 1959):

> . . . a body of water should be available to all owners for use that would not unreasonably interfere with rights of other proprietors.

Florida commentators on *Duval, supra,* have interpreted the case as adopting a rule of reasonableness. F. MALONEY, S. PLAGER, & F. BALDWIN, WATER LAW AND ADMINISTRATION —THE FLORIDA EXPERIENCE § 23.1, at 52-54 (1968). Both cases involved blocking of riparian access by bed owners' fences.

[62] 74 Wn. 2d 575, 445 P.2d 648 (1968). Discussed in text accompanying notes 14-18 *supra* and notes 65 *et seq. infra.*

[63] That these cases did not involve structural or fill uses might be crucial. Both cases which did face structural or fill uses, Bach v. Sarich, 74 Wn. 2d 575, 445 P.2d 648 (1968),

The test of "reasonableness" can justly mediate conflicts between a bed owner's property right and a riparian right of common use. The bed titleholder may fill and build so long as he does not unreasonably interfere with the riparian rights of recreational use. The riparians are assured of a reasonable scope for their right of recreational use, albeit not over every inch of lake surface. In short, both rights are preserved and each is exercisable to a reasonable extent.[64]

B. The Riparian—Non-Riparian Use Test

The categorical test applied by the Washington Supreme Court in *Bach v. Sarich*,[65] as previously noted, distinguishes between riparian and non-riparian structural uses and fills. But the riparian-ness of a use does not necessarily follow from the fact that the use is performed by a riparian owner, in a riparian location, or under a claim of authority arising out of riparian rights; instead, the Washington Supreme Court put forth an unique definition:[66]

> Mere proximity of the apartment does not render it a riparian use. With respect to a structure, such a use must be so intimately associated with the water that apart from the water its utility would be seriously impaired.

The court thus first tests the use for "intimate association with the water" in order to ascertain its status as riparian *vel non*. If the use

and Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117 (1946), employed a type of use approach (certainly so in *Bach*, arguably so in *Burt*). *See* notes 65-73 and accompanying text *infra*. *Bach's* adoption of a riparianness test is especially interesting on this point, for Snively v. Jaber, 48 Wn. 2d 815, 822, 296 P.2d 1015, 1019 (1956), in which the rule of common use was adopted in Washington, had spoken solely in terms of reasonableness:

> [the riparian] may use the entire surface of the lake so long as he does not unreasonably interfere with the exercise of similar rights by the other owners.

Yet *Bach* swerved from the straight reasonableness analysis, lending credence to a prediction that other common use courts might follow suit when faced with a structural or fill use.

[64] The reasonableness test might also apply in those jurisdictions which arrive at common use via declaration of a public right of navigation, rather than through riparian rights concepts. It could, for example, be applied in Wyoming where the court in Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) recognized such a public right of use in all waters of the state. This right is based on an easement theory: the title to the waters is in the state; the state necessarily has an easement over private lands for the flow of its waters; thus, the waters, not being in trespass over the lands, are available for public use. It could be argued that a lakebed owner could only make a reasonable use of his portion of the bed, otherwise he would be interfering with the state's and the public's easement. Conceivably reasonableness here might be construed to mean water-relatedness, also. A similar argument could be made as to Missouri (Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954)) and other states that adhere to the public right of navigation approach. *See* note 43 *supra*.

[65] 74 Wn. 2d 575, 445 P.2d 648 (1968).

[66] *Id.* at 579, 445 P.2d at 651.

is determined to be non-riparian, then it is unlawful, *even if it is in fact reasonable.* If the use is ruled riparian, however, the test of "reasonableness" must still be fulfilled before the court will conclude that the use is permissible. This additional examination for reasonableness seems to be plainly required by earlier Washington decisions dealing with recreational uses which held that a riparian use must be reasonable.[67] Thus, in Washington, a structural use or fill must be both riparian *and* reasonable in order to be lawful. Any non-riparian use which occupies even a minute portion of a nonnavigable lake surface should be illegal under the strict logic of the *Bach* opinion.

Bach is a unique decision. The only case closely resembling it is *Burt v. Munger*,[68] a 1946 declaratory judgment action in which the Michigan Supreme Court denied a riparian bed owner the right to make two dirt fills on the bed of a nonnavigable lake. One fill was designed to prevent erosion, the other to increase the size of the upland.

Bach and *Burt* both relied on earlier "common use" decisions in their respective jurisdictions holding that "[e]ach riparian owner has the right to fish in any part of the lake,"[69] and that "[a]ll riparian owners along the shore of a natural, nonnavigable lake share in common the right to use the entire surface of the lake for boating, swimming, fishing, and other similar riparian rights so long as there is no unreasonable interference with the exercise of these rights by other respective owners."[70] In both cases, the courts ruled that the structure and the fills, respectively, constituted an impermissible interference with the common rights of recreational use belonging to other riparians. *Bach* explicitly based its decision on the non-riparian nature of the

[67] Botton v. State, 69 Wn. 2d 751, 420 P.2d 352 (1966); Ames Lake Community Club v. State, 69 Wn. 2d 769, 420 P.2d 363 (1966) (per curiam). In these cases unregulated access of state licensees (entering through a Game Department road) was enjoined as unreasonable on the petition of riparian owners. The cases are discussed in Note, *The Tale of Two Lakes—A New Chapter in Washington Water Law*, 43 WASH. L. REV. 475 (1967).

In *Bach*, however, the court was not required to proceed to a reasonableness examination, given its initial determination that the apartment was not a riparian use.

[68] 314 Mich. 659, 23 N.W.2d 117 (1946).

[69] Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117, 119 (1946), *quoting* Bauman v. Barendregt, 251 Mich. 67, 231 N.W. 70, 71 (1930). The rule of common use was first adopted in Michigan in Beach v. Hayner, 207 Mich. 93, 173 N.W. 487 (1919)—the forerunner of the modern common use cases in other jurisdictions.

[70] Bach v. Sarich, 74 Wn. 2d 575, 580, 445 P.2d 648, 651-52 (1968), *citing* Snively v. Jaber, 48 Wn. 2d 815, 296 P.2d 1015 (1956), and Botton v. State, 69 Wn. 2d 751, 420 P.2d 352 (1966).

apartment building. *Burt* is unclear on this point, but the fact that the court there denied the bed owner permission to construct a retaining wall only a few feet off shore seems to indicate that the court was applying something more than a simple "reasonable use" test.[71] Moreover, language in the *Burt* opinion is consistent with the *Bach* "riparian use" test:[72]

> [W]e are not unmindful of the general rule that a riparian proprietor may construct a dock, wharf, or pier *for the purpose of facilitating his use and enjoyment of the waters of the lake.* [citation omitted] In the case at bar, however, *such is not the purpose* of either the proposed wall or the filling in of the submerged land. (Emphasis added.)

The court's reference to wharves and docks indicates approval of obviously riparian or "water-related" structures, and the emphasis on the "purpose" seems to establish a condition which would exclude non-riparian uses. It is thus possible to conclude that both *Burt* and *Bach* have adopted a "riparian use" test as a supplement to the test of "reasonableness."[73]

As we have previously mentioned,[74] the common use decisions from other jurisdictions dealing with recreational uses exhibit no reliance on riparian-ness. Yet, the fence cases,[75] involving attempts by the bed

[71] The same Florida commentators who interpreted Duval v. Thomas, 114 So. 2d 791 (Fla. 1959), as adopting the test of reasonableness (*see* note 61 *supra*), interpreted the order to remove the retaining wall to mean that *Burt* was "contrary to the reasonable use rule." F. MALONEY, S. PLAGER, & F. BALDWIN, *supra* note 61, at 54. A Florida case holds that a retaining wall is permissable if on upland. Hill v. McDuffie, 196 So. 2d 790 (Fla. Dist. Ct. App. 1967).

[72] Burt v. Munger, 314 Mich. 659, 23 N.W.2d at 120.

[73] A recent opinion of a Michigan intermediate appellate court has language at least contrary in spirit to an interpretation of *Burt* as adhering to a strict riparian use theory. *Inter alia* the court spoke of failure of proof that the fill "will *substantially* affect the total surface area of the lake for boating and swimming." Henson v. Gerloffs, 13 Mich. App. 435, 164 N.W.2d 533, 539 (1969) (emphasis supplied). The language was dictum, however, for the fill at issue was apparently on upland. In any event the language does not bind the Michigan Supreme Court, which rendered *Burt*.

[74] *See* note 61 and accompanying text *supra*.

[75] The main common use fence decisions, including some cases involving obstructions other than by fencing, are: Michigan—Rice v. Naimish, 8 Mich. App. 698, 155 N.W.2d 370 (1968); Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748 (1957); Manney v. Prouse, 248 Mich. 654, 227 N.W. 685 (1929); Collins v. Gearhardt, 237 Mich. 38, 211 N.W. 115 (1926). *See also* Ruggles v. Dandison, 284 Mich. 338, 279 N.W. 851 (1938). Minnesota—Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960). Missouri—Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Greisinger v. Klinhart, 321 Mo. 186, 9 S.W.2d 978 (1928); Mueller v. Klinhart, 167 S.W.2d 670 (Mo. Ct. App. 1943); Sneed v. Weber, 307 S.W.2d 681 (Mo. Ct. App. 1957); Luesse v. Weber, 350 S.W.2d 424 (Mo. Ct. App. 1961). (All save *Delcour* involved artificial lakes. In the *Klinhart* cases the obstruction was enjoined, but in the *Weber* cases the injunction was denied.) Florida—Duval v.

owner to fence out other riparians or the general public, are at least consistent with the tests for reasonableness *or* riparian-ness. In each of these cases, "common use" courts have hastened to enjoin construction of such fences, but the facts in each case are adaptable to a decision based on either the unreasonableness of the fence or its non-riparian nature.[76] For example, in *Rice v. Naimish*,[77] a recent Michigan opinion, the plaintiff was a riparian who owned two upland parcels situated on each side of the defendant's tract. Plaintiff also held title to a portion of the bed of the nonnavigable lake on which the upland parcels abutted. The conflict arose when plaintiff erected a fence across the lake on his bed to connect his separated upland parcels. Defendant, whose deep water access was thus obstructed, tore down the fence. The court held that the defendant was privileged to remove the fence since it impeded his right of common use. Within the "reasonableness" context, the facts clearly illustrate the great harm to the defendant resulting from total loss of his rights of recreational use, as compared to the slight benefit to the plaintiff—which indicates that the fence was clearly unreasonable—and the court did utilize the term "unreasonably" (but rather casually). On the other hand, it is also obvious that the fence did not serve any riparian purpose of the plaintiff, and could have been enjoined on the non-riparian use rationale, since it merely connected two upland tracts, and was evidently primarily intended to prevent defendant's use of the lake. *Bach* and *Burt* are thus the only two cases which can reasonably be interpreted as actually applying the "riparian use" test.

The approach of *Bach* (and, arguably, of *Burt*) is to reconcile conflicts between surface users and bed owners by resort not only to the traditional test of "reasonableness," but also by a preliminary inquiry as to the riparian character *vel non* of each particular use by the bed

Thomas, 114 So. 2d 791 (Fla. 1959), *aff'g* 107 So. 2d 148 (Fla. Dist. Ct. App. 1958); Conrad v. Whitney, 141 So. 2d 796 (Fla. Dist. Ct. App. 1962). Virginia—Wickouski v. Swift, 203 Va. 467, 124 S.E.2d 892 (1962) (permissible when bed surveyed). Texas—Taylor Fishing Club v. Hammet, 88 S.W.2d 127 (Tex. Civ. App. 1935) (permissible when bed surveyed). Compare the Wisconsin cases which present special considerations due to public ownership of lake beds. *See, e.g.*, Baker v. Voss, 217 Wis. 415, 259 N.W. 413 (1935); Mayer v. Grueber, 29 Wis. 2d 168, 138 N.W.2d 197 (1965) (artificial lake).

[76] There are occasional exceptions. For example, the Florida intermediate appellate court, in Duval v. Thomas, 107 So. 2d 148, 151-53, (Fla. Dist. Ct. App. 1958) *aff'd* 114 So. 2d 791 (Fla. 1959), used an extensive analysis of the reasonable use theory on which to base its ruling against the fence owner.

[77] 8 Mich. App. 698, 155 N.W.2d 370 (1968).

owner. On its merits, this riparian-ness or "water-related" use test is certainly justifiable. The rights of recreational users are thereby protected by allowing only those structural and fill uses which are natural and appropriate at a riparian location. Furthermore, even a "water-related" use (e.g., a dock) will not be permitted to so *unreasonably* consume the lake surface so as to render boating or fishing impossible or impractical, for the limit of "reasonableness" is undisturbed. But the bed owner does retain an exclusive right to build docks[78] boathouses, rafts[79] and other "water-related" structures[80] on his bed, and to fill thereon in order to facilitate such construction. In addition, ownership of a portion of the bed gives rise to other exclusive rights such as permanent anchorage,[81] trapping,[82] walking on the bed (possibly),[83] and still others.[84] Of course, all such uses must still be reason-

[78] *See, e.g.*, Farnes v. Lane, 281 Minn. 222, 161 N.W.2d 297, 299 (1968); Blain v. Craigie, 294 Mich. 545, 293 N.W. 745 (1940) (sub silentio).

[79] *See* Swartz v. Sherston, 299 Mich. 423, 300 N.W. 148 (1941) (which prohibited a neighboring riparian from anchoring a swimming dock and slide on the bed owner's bed, implying that the bed owner has an exclusive right as regards such uses); Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953).

[80] The exact nature of a "water-related" use is not easy to envision. Even an apartment such as in *Bach* could arguably be classified as water-related if the lake location was an intimate part of the apartment design. Such a conclusion seems unlikely, however. A closer question is as to houseboats. One could argue that they had no use at all unless floating on water, just as if a boat. On the other hand, one could argue that they are just a house, without water-relation, and should be confined to the upland.

Another debatable use is a retaining wall built to protect upland from water erosion. One could argue that such a wall is water-related, since its sole function is to protect against the water. But in *Burt* a retaining wall built only a few feet from shore was held impermissible. However, if the wall is on upland it is lawful. Hill v. McDuffie, 196 So. 2d 790 (Fla. Dist. Ct. App. 1967); Barnes v. Marshall, 68 Cal. 569, 10 P. 115 (1886). A retaining wall just a few feet from shore would probably be held reasonable, and given the relation of its purpose to the water, it is arguably "water-related" under the *Bach* test. However, as with all such questions of what fill or structures are permissible under *Bach*, a final answer must await further litigation.

[81] *See* Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953) (member of the public prohibited from permanently anchoring a raft on privately-owned lake bed).

[82] *See* Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 38 N.W.2d 712, 715-16 (1949) in which trapping was held to be an incident of bed ownership and not encompassed within the public right of surface navigation. The case involved a stream, bed title under Wisconsin law being in private ownership unlike the case of lake beds. *See* note 21 *supra*.

[83] *Compare* Day v. Armstrong, 362 P.2d 137, 146 (Wyo. 1961) (dictum that more than incidental use of private stream bed by one exercising public easement of navigation is a trespass) *with* Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17, 27 (1954) (fisherman may walk down private stream bed in exercise of public right of navigation) *and* Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 38 N.W.2d 712, 716 (1949) (dictum that bathers and fisherman exercising their public right of navigation may walk on privately-owned stream bed).

[84] Examples of other possible exclusive use rights of the bed owner are taking of ice, Haase v. Kingston Co-operative Creamery Ass'n, 212 Wis. 585, 250 N.W. 444 (1933), and taking of sand and gravel, 1 WATERS AND WATER RIGHTS 218 (R. Clark ed. 1967).

able.[85] On balance, it is evident that the property rights of the bed owner have not been confiscated, and that very substantial rights remain; any limitation of such property rights has been necessitated by reason of their conflict with other rights of property,[86] that is, the riparian right to common use of the lake surface for recreational purposes.

It is arguable that *Bach* imposed an unnecessarily rigid and stringent rule when it prohibited *all* non-riparian structural and fill uses on lake surfaces, regardless of their reasonableness.[87] Of course, with respect to some lakes—perhaps most—there is obvious wisdom in allowing only riparian structures and fill; but, just as obviously, this might be unwise on other lakes. Considering the presence of several thousand lakes in Washington, it might be desirable and entirely proper to permit some filling and building on some of these lakes, for residences and parks, for example, or even for industrial purposes on lakes which are completely unsuitable for recreational use. The Washington Supreme Court, however, exhibiting an implicit preference for conservation of environmental quality, apparently concluded that the value of our small lakes for scenery, open space, and recreation is so great that they should be absolutely protected from invasion by non-riparian fills and buildings. The court was probably concerned that a "reasonableness" test would be uncertain enough to allow aggressive developers to forge ahead with fills and construction too rapidly to be effectively controlled by court actions. An absolute prohibition of non-riparian uses certainly reduces, and perhaps eliminates, this possibility. Moreover, given the intense demographic and geographic pressures on our remaining open spaces, the *Bach* decision seems to state wise social policy insofar as it provides a countervailing force in the lakes setting.

The *Bach* riparian-non-riparian use test also serves to diminish the uncertainty of the traditional reasonableness test. But even under the

[85] *Cf.* Morgan v. Kloss, 244 Mich. 192, 221 N.W. 113 (1928) (bridge, entirely on private bed, held interference with public right of surface use).

[86] The riparian right of common use has been held one of property. *See* authorities cited in note 30 *supra.*

[87] Under the *Bach* rule not even a state or municipality could fill or build for non-riparian purposes without paying compensation since otherwise a "taking" of riparian property rights would result. A park fill might be considered riparian, however, given its enhancement of lake access and view. *See* City of Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674, 678 (1957), where a civic center on navigable lake fill was held consistent with the state's trusteeship over public waters, partly on view and access considerations.

new classifications, a measure of uncertainty remains, *i.e.* as to whether or not a use is riparian. Furthermore, the rigidity of this new rule sacrifices flexibility of analysis, and relinquishes all opportunity to discriminate among our diverse nonnavigable lakes. Ultimately, to decide whether the riparian-ness or the reasonableness test is the better device for dealing with conflicts between bed owners and surface users will require realistic assessment of the weight desirable to attach to the conservationist goal of small lake preservation. If a high value is ascribed to that goal, then clearly preferable is *Bach's* test of riparianness, which is stricter and prohibits more uses. If, on the other hand, less weight is attached to the conservationist goals, then the test of "reasonableness" is the more likely selection, for it possesses greater flexibility and pays greater deference to the property rights of bed owners. The question is essentially one of policy, which may vary in different regional settings.

C. A Postscript on the "Private" Lake

In the preceding sections, we have emphasized the available mechanisms for resolution of the conflict, in the common use jurisdictions, between the bed owner's use of his bed for fill and construction and the riparian owner's common right of recreational use. Although we have alluded to the public policy in favor of preserving small lakes for open space, scenic views, and recreation, this policy has not heretofore been essential to our analysis, since some limitation of fills and structural uses is required independently of any public policy considerations by the simple necessity to resolve the bed-surface use conflict. However, when a nonnavigable lake bed and all the surrounding upland is owned by one individual, or when all bed and surrounding upland owners are in agreement on the development of the lake, there is no bed-surface use conflict. Should there not be some public policy interest in preserving the lake surface from unreasonable or non-riparian construction thereon?

Suppose, for example, that the owner or owners propose to erect a large structure, necessitating much fill (such as a small manufacturing plant), over a nonnavigable lake surface; and further suppose that the building would be adjudged clearly non-riparian and unreasonable if its construction were to be challenged by one of the participating riparians, but that it does not constitute a public or private nuisance.

Now public policy considerations become paramount, since the need for use-reconciliation does not exist. We believe that it is a critical question whether a public policy of preserving small lakes should require application of the reasonableness or riparian-ness tests in a situation where there is no underlying necessity to reconcile conflicting bed and surface uses; but we do not presume to answer this question, believing it to be outside the scope of our present inquiry and more appropriately resolved by reference to particular local conditions. Nonetheless, we will briefly examine the question of whether the concepts of reasonableness and/or riparian-ness do now apply to such situations; in short, under present authorities, is there such a thing as a "private" lake?

The answer must be yes, but somewhat qualified. In those jurisdictions which do not recognize any right in the general public to use nonnavigable lake surfaces, there is no apparent basis upon which construction or nonnavigable lake beds by agreement of all upland and bed owners could be prevented.[88] In *Bach* the order to remove the apartment building was justified solely on the ground of interference with common rights of use by other riparians.[89] But where all riparians have surrendered these rights respecting that portion of the bed over which the structure is planned, no such interference would exist, and protections of riparians would not justify an injunction. The test of "reasonableness," being also theoretically dependent upon interference with rights of other riparians, would likewise be inapplicable.[90] Thus, where the right of common use is recognized only in riparians and not in the public generally, we envision no judicial obstacle to fills or structural uses by agreement of all riparians and bed owners.

In a jurisdiction which does recognize public rights of common use, however, the answer is not so certain. Where public access to the lake

[88] In a jurisdiction such as Florida which attaches riparian rights only to bed ownership, consent of upland owners would not be necessary, but only that of bed owners. *See* note 27 *supra.*

[89] 74 Wn. 2d 575, 580, 445 P.2d 648, 651-52 (1968).

[90] *See* RESTATEMENT OF TORTS §§ 851-54 (1939).

Florida commentators have concluded that in Florida (where the rule of reasonableness was adhered to in Duval v. Thomas, 114 So. 2d 791 (Fla. 1959), *aff'g* 107 So. 2d 148 (Fla. Dist. Ct. App. 1958))

> [i]f the bed of a non-navigable lake is entirely owned by one individual, he apparently can use the lake as he would any other piece of realty, including filling it in and building on it.

Maloney & Plager, *supra* note 27, at 67-68.

is available, erection of a structure over the water would obviously infringe these rights; conversely, however, where there is no such access, it does not necessarily follow that there is no legal impediment to the construction.[91] Perhaps the potentiality of future public access should be sufficient to justify application of judicial limitations, but the possibility that one riparian may grant access in the future is probably not enough.[92] The probability that such a private grant would ever occur is highly conjectural, and even if such a grant were made, it is likely that it would be subject to the riparian's earlier consent to the structure. If, however, the state has the authority to condemn access routes to nonnavigable lakes, rendering the public expectancy in surface use rights more substantial, judicial restraints on bed uses could probably be justified, especially in those jurisdictions where the state power of condemnation is exercisable with respect to lakes which are entirely situated on the property of one individual.[93] While the exercise of the power would still be conjectural, nevertheless, application of judicial limitations prior to any actual access condemnation could be rationalized on the basis of the reasonable apprehension that the rapid pace of development might consume all available nonnavigable lakes suitable for recreational use before access rights could be acquired, thus frustrating the policy underlying the access condemnation statutes.[94] But the doctrinal legitimacy of so "reserving" all nonnavigable "private" lakes on the chance that public access might be condemned at some future time seems questionable. Thus, we doubt that judicial

[91] Even in a public use jurisdiction, the public may not trespass to obtain access to the lake. *See, e.g.*, Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748 (1957), *quoted* note 45 *supra;* Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393 (1923).

[92] Cases have held that access rights may be granted to the public by one riparian over protests of other riparians. *E.g.*, Bartlett v. Stalker Lake Sportsmen's Club, —— Minn. ——, 168 N.W.2d 356 (1969); Flynn v. Beisel, 257 Minn. 531, 102 N.W.2d 284 (1960). If the conduct of the public is unreasonable, however, access may be enjoined. *E.g.*, Botton v. State, 69 Wn. 2d 751, 420 P.2d 352 (1966); Ames Lake Community Club v. State, 69 Wn. 2d 769, 420 P.2d 363 (1966) (per curiam), *noted in* 43 WASH. L. REV. 475 (1967).

[93] As to condemnation of access to a lake wholly on the land of one person *compare* Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W.2d 105 (1961) (condemnation permitted) *with* State, by Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954) *and* Osceola County v. Triple E Dev. Co., 90 So.2d 600 (Fla. 1956) (prohibiting condemnation).

[94] Analogously, however, legislative attempts to prohibit building in strips scheduled for eventual street right of way condemnation has not always received judicial favor. *Cf.* Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936).

rules alone can do very much, if anything at all, to preserve non-navigable lakes from structural obliteration by sole owners or by concurring bed and riparian owners.

* * *

In our opinion either the "reasonable use" test or the "riparian-non-riparian" test can perform very satisfactorily as a mechanism for resolving disputes between bed owners and surface users. The riparian use rule also serves a conservationist goal of lake preservation insofar as it permits a dissenting riparian (and possibly a member of the public) to prevent use of lakebeds for non-riparian fills or structures; the test of reasonableness is less vigorous in this regard. Neither rule, however, promises to be effective at protecting lakes from invasions by sole owners or concurring bed and riparian owners who decide to fill and build, because these judicial rules depend for their applicability upon some interference with riparian rights, which does not exist as to consenting riparians. Each of these rules also possesses the disadvantage of some uncertainty; only occasionally will a bed owner be able to definitely ascertain whether his structure or fill is "reasonable" or "riparian", short of judicial approval. But all of these problems remind us of those which plagued the "nuisance test" for resolving dry land use conflicts some years ago. In that situation, when the problems became too complex for the judicial machinery, there was a movement toward control through enactment of zoning laws and regulations. We suggest that a similar zoning solution would be an appropriate means for improvement and supplementation of the present management of lake use conflicts by judicial limitations. Zoning would permit particularized regulation of all lakes (even those which are privately owned), without the necessity of reliance on a riparian plaintiff, and could serve as the vehicle for expression of public water policy respecting our small lakes.

II. LEGISLATIVE REGULATION AND BEYOND

A. Zoning

The usefulness of zoning in the context of small lake filling and building seems obvious to us; yet, insofar as we have been able to ascertain, zoning has never been *purposefully* applied in order to reg-

ulate bed and surface uses of nonnavigable lakes.[95] The *Bach* case illustrates what we believe to be a general small lake situation: the bed of nonnavigable Bitter Lake had been classified on a zoning map to permit apartments; yet there was no evidence that the zoning body, the Seattle City Council, had ever given any special consideration to the fact that the zone area encompassed a lake bed.[96] Not surprisingly, the Washington Supreme Court dismissed the zoning contention in *Bach*, stating that it was "certain" that the authorization of apartment uses on the lake bed was "not intended by the Seattle zoning authorities."[97]

[95] By "purposefully" we mean to emphasize an effort to regulate lake bed uses specially as distinct from general land use controls.

In the summer and fall of 1968, we communicated with planning officials and legal officers in various West and Mid-West counties and municipalities which were characterized by large population concentrations and the presence of small lakes. Cities contacted included Denver, Oklahoma City, Wichita, Kansas City, St. Louis, Minneapolis, St. Paul, Des Moines, Milwaukee, Grand Rapids, and Seattle. Response was excellent, but, at least as of that time, no locality had embarked on a program of small lake zoning. Several cities, however, for example Minneapolis and St. Louis, had achieved the ultimate control solution—public ownership for park purposes of all or many of the small lakes within their boundaries.

General zoning regulations, however, have been extended to navigable waters filling and building. (*See* cases cited in note 108 *infra*.) Some water structures have been specifically regulated. *See, e.g.*, SEATTLE, WASH., CODE § 26.12.040(k) (1968) (moorages for private pleasure craft). More frequently upland zoning is simply extended to adjacent water areas. *See, e.g.*, SEATTLE, WASH., CODE § 26.08.030(a) (1968) (which, in the absence of harbor lines, extends the upland zone boundary 500 feet out from the natural shore line of a navigable water body); and Ponelait v. Dudas, 141 Conn. 413, 106 A.2d 479 (1954) (case upholding ordinance extending upland zoning to fill in navigable waters). One court has construed a zoning ordinance which restricted "land" uses to apply to "land" underlying tidal waters. Wynn v. Margate City, 9 N.J. Misc. 1324, 157 A. 565 (1931) (per curiam). Some special waterfront zones are also to be found, but these zones are often designed just to authorize special types of water uses (such as marinas) in certain areas, without purporting to comprehensively regulate the use of lake beds. *See, e.g.*, SEATTLE, WASH., CODE ch. 26.18 (1968) (Residence Waterfront Zone). All of these regulations, however, are directed at navigable water bed uses.

We know of no "purposeful" zoning control of common use nonnavigable lakes, which aims at reconciliation of the bed-surface use conflict or promotion of a public policy of small lake preservation. Minnesota does control structural and fill uses to some extent under a permit system. Anyone desiring ". . . in any manner . . . to change or diminish the course, current or cross-section of any public water . . ." must first obtain a permit from the state conservation commissioner. MINN. STAT. ANN. § 105.42 (1964). "Public waters" includes all lakes "capable of substantial beneficial public use." *Id.* § 105.38. The definition apparently does encompass some nonnavigable lakes, but does not include "private lakes," ones to which no public access is available. *See* State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699, 705-06 (1963).

[96] Although zoning lines were extended over and through Bitter Lake, they were terminated close off shore in the case of Haller Lake, another small nonnavigable lake in Seattle, located just a few miles from Bitter Lake. Given total lack of any indication that the city had intended to zone Bitter Lake, but not Haller Lake, such inconsistency provides some evidence that the city draws or does not draw zoning lines with little or no concern as to the existence of lakes.

[97] Bach v. Sarich, 74 Wn. 2d 575, 580, 445 P.2d 648, 652 (1968).

It is somewhat surprising that zoning has not yet been consciously applied to small lake fills and structures. Commentators have advocated zoning of water surface uses.[98] Conflicts between builders and recreational users are increasingly frequent now, and should provide ample incentive for adoption of administrative controls.[99] We believe that the number and variety of such conflicts will soon outstrip the capabilities of the judicial system, and that it would be far better to initiate supplementary zoning regulations in anticipation now, rather than at some later time under the force of necessity.

The states undoubtedly have the power to zone lake beds, just as they do to zone dry land. If the bed owner's right of use is treated strictly as a dry land property interest, then it would be permissible to zone the lake bed under the authority of the long-settled constitutionality of dry land zoning.[100] Even if the right of the bed owner to fill and build is considered a riparian right (*i.e.*, either *per se* in a state like Washington which applies the riparian use test, or derivatively because regulation of it affects the exercise of riparian rights[101]), it is a property right,[102] which may not be "taken," but may be "regulated" under the state's police power.[103] Reasonable regulation of various riparian rights has been upheld,[104] including regulation of wharves[105]

[98] Among them have been Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542, 600-06 (1958) (Waite outlines a comprehensive state-local zoning program); Waite, *Pleasure Boating in a Federal Union*, 10 BUFFALO L. REV. 427, 443-47 (1961) (primarily recreational as opposed to structural use zoning) Maloney & Plager, *supra* note 27, at 64 (suggestion rather than advocation); Comment, *Role of Local Government in Water Law*, 1959 WIS. L. REV. 117, 135-41 (1959).

[99] In Washington State alone, in addition to the dispute on Bitter Lake leading to *Bach*, conflicts as to water fills and buildings have arisen on the navigable waters of Lake Chelan, Lake Union (Seattle), and Hood Canal (salt water). For a discussion of the Lake Chelan dispute and the Washington Supreme Court opinion arising out of it, Wilbour v. Gallagher, 77 Wash. Dec. 2d 307, 462 P.2d 232 (1969), see Corker, *supra* note 8.

[100] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[101] For example, in one case it was argued that zoning prohibition of a boat livery on navigable water fill was unlawful insofar as such regulation impeded the use of the sea and navigable waters. The court treated the application of the zoning ordinance as a regulation of riparian rights, but upheld the enactment as against the fill owner's contention, ruling that riparian rights, as well as dry land property rights, were subject to reasonable zoning regulation. Ponelait v. Dudas, 141 Conn. 413, 106 A.2d 479, 481 (1954).

[102] *See* cases cited in note 30 *supra*.

[103] California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 562 (9th Cir. 1934), *aff'd* 295 U.S. 142 (1935); Note, *The State v. The Riparian: A Problem of Water Use and Control*, 1961 WASH. U.L.Q. 257, 269-71 (1961).

[104] For examples see Maloney & Plager, *supra* note 27, at 70-73; Note, *The State v. The Riparian: A Problem of Water Use and Control*, 1961 WASH. U.L.Q. 257, 269-71; 1 WATERS AND WATER RIGHTS § 53.5(E) (R. Clark ed. 1967).

[105] *See, e.g.*, Cummings v. Chicago, 188 U.S. 410 (1903).

and fills.[106] Regulation by zoning has itself been upheld in situations where it affects riparian rights,[107] but there is little direct authority on the power of the state and local governments to zone lake bed fill and building uses.[108] Significantly, zoning, unlike the judicial rules,[109] would apply to the "private" lakes, those owned wholly by one individual or by multiple owners in agreement on the development of the lake.[110] Even assuming a general power to zone lake beds, however, there remains some question concerning the authority of localities under present state enabling acts; thus, a statutory amendment might be necessary in some instances.[111]

[106] *See, e.g.*, State v. Kuluvar, 266 Minn. 408, 123 N.W.2d 699, 706 (1963).

[107] Grosse Ile Township v. Dunbar and Sullivan Dredging Co., 15 Mich. App. 556, 167 N.W.2d 311 (1969); Ponelait v. Dudas, 141 Conn. 413, 106 A.2d 479 (1954); Raffale v. Planning and Zoning Bd. of Appeals, 157 Conn. 454, 254 A.2d 868 (1969); Wynn v. Margate City, 9 N.J. Misc. 1324, 157 A. 565 (1931) (per curiam); Little v. Young, 82 N.Y.S.2d 909 (Sup. Ct. 1948) *aff'd* 274 App. Div. 1005, 85 N.Y.S.2d 41 (1948) (mem.), *aff'd* 299 N.Y. 699, 87 N.E.2d 74 (1949) (mem.); Dennis v. Village of Tonka Bay, 64 F. Supp. 214 (D. Minn.), *aff'd* 156 F.2d 672 (8th Cir. 1946); Wicen v. Oconomowac Fisherman's League, Circuit Court, Waukesha County, Wis., No. 9142, June, 1958 (this case is discussed in Comment, *Role of Local Government in Water Law*, 1959 WIS. L. REV. 117, 138-39 (1959)). *Cf.* Hauser v. Arness, 44 Wn. 2d 358, 267 P.2d 691 (1954). For a general discussion see Comment, *Role of Local Government in Water Law*, 1959 WIS. L. REV. 117, 135-41 (1959).

[108] In Ponelait v. Dudas, 141 Conn. 413, 106 A.2d 479, 481 (1954), the Supreme Court of Errors of Connecticut upheld an ordinance extending upland zoning to fills and structures in previously unzoned waters. The case involved a 225 foot hill in navigable waters. In Wynn v. Margate City, 9 N.J. Misc. 1324, 157 A. 565 (1931) (per curiam) side lot line restrictions applying to "land" were held applicable to land under water so as to render a house on pilings over tidal waters in violation of the ordinance. In Grosse Ile Township v. Dunbar and Sullivan Dredging Co., 15 Mich. App. 556, 167 N.W.2d 311 (1969), a dike and fill operation in the navigable Detroit River was, as an alternative holding, enjoined as a violation of a town zoning ordinance. All of these decisions concerned navigable waters, but there should be no difference in result as to nonnavigable water bodies.

[109] *See* notes 88-94 and accompanying text *supra*.

[110] Zoning has long been approved as a limitation on private property rights. Since a bed owner can be in violation of a zoning ordinance despite lack of interference with riparian rights, zoning, unlike the judicial limitations, would seem plainly applicable to private waters.

[111] FLA. STAT. ANN. § 176.02 (1966), which authorizes municipalities to "regulate and restrict . . . the location and use of buildings, structures, and land and water for trade, industry, residence or other purposes" is one zoning enabling act which specifically grants local authority to zone water. Other state enabling acts typically do not mention water. For example, WASH. REV. CODE § 35.63.080 (1965), authorizes cities to "regulate and restrict the location and use of buildings, structures and land for residence, trade, industrial and other purposes . . . ." (This section does specifically refer to set-backs along "public water frontages".) Zoning of bed fills and structures may be authorized by a provision such as the Washington one, however. "Land" could be interpreted to refer to land under water as well as upland. This approach was employed in Wynn v. Margate City, 9 N.J. Misc. 1324, 157 A. 565 (1931) (per curiam) (*see* note 108 *supra*). Alternatively, the provision could simply be construed to authorize regulation of "buildings" and "structures" wherever located. Thus, an amendment might not need to be obtained in Washington.

In any event, the power to regulate fills and buildings on lake beds is not without limit. For example, the state may not use such regulation to confiscate private property without "just compensation."[112] Whether a zoning regulation is "confiscatory" is generally determined by weighing the public interest in the enactment against the private loss of the property owner.[113] To cause loss of some economic value alone is not confiscatory,[114] but to zone an entire lake for open space, prohibiting all fills and buildings, probably would be.[115] On the other hand, restriction of a lake bed to certain "water-related" uses, such as boathouses, docks, rafts, etc., would probably not be confiscatory, because the property owner's loss of the opportunity to build non-riparian structures would be outweighed by the public interest in preserving small lakes.[116] But aside from the obvious cases, the exact limits imposed on the zoning power in the small lake setting by the concept of "confiscation" can only be defined by litigation of particular fact patterns.

The "just compensation" limitation applies generally to all zoning of lake surfaces. Additionally, in the "common use" jurisdictions, no governmental unit may authorize, by zoning, any fill or structural use which is unreasonable, or non-riparian (where the *Bach* rule applies), since such uses are, despite their zoning classification, unlawful inter-

[112] The "just compensation" requirement of the fifth amendment has been applied to the states through incorporation within the meaning of "due process" under the fourteenth amendment. *See, e.g.*, Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896). On zoning in particular, *see* Nectow v. City of Cambridge, 277 U.S. 183 (1928); Bach v. Sarich, 74 Wn. 2d 575, 445 P.2d 648 (1968); 1 RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 6 (1965 *as supp.* 1969) [hereinafter cited as RATHKOPF]. A recurring issue as to whether a "taking" has resulted in the riparian rights area arises when a city attempts to prevent riparians from swimming or bathing in waters from which the public drinking supply is obtained. The cases are divided on whether compensation is required. Leading cases requiring compensation are Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956), 56 A.L.R.2d 778 (1957); and People v. Hurlburt, 131 Mich. 156, 91 N.W. 211 (1902). A good short discussion is available in Note, *Governmental Restriction of Water Use*, 1959 WIS. L. REV. 341 (1959).

[113] Note, *Fishing and Recreational Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322, 1325-26 (1968); Note, *The State v. The Riparian: A Problem of Water Use and Control*, 1961 WASH. U.L.Q. 257, 270-71 (1961).

[114] 1 RATHKOPF, *supra* note 112, at 6-5-6-6.

[115] Waite, *The Dilemma of Water Recreation and A Suggested Solution*, 1958 WIS. L. REV. 542, 605 (1958), suggests that such open space zoning might be permissible if sufficient public necessity is shown. It can be argued, however, that total open space zoning, being for general public benefit, should be paid for by the public through condemnation proceedings rather than placed solely on the private individual whose use is restricted. *See* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 665, 666 (1958), *as quoted* in 1 RATHKOPF, *supra* note 112, at 6-7-6-10.

[116] In this case as opposed to total open space zoning, the property owner would retain sufficient rights of use as to render a holding of confiscation improbable.

ferences with the rights of riparians to use the lake surface for recreational purposes. The *Bach* court was explicit on this point:[117]

> These rights [of common use] are vested property rights, and may not be taken or damaged for public or private use without just compensation. [citation omitted] It follows, therefore, that while the city of Seattle might regulate the exercise of these rights by means of its police power, it may not totally divest plaintiffs of them through the mechanisms of zoning. Indeed, the effect of this case, if we were to follow defendants' reasoning would be to divest plaintiffs of valuable property rights for the private use and benefit of defendants.

In these jurisdictions, then, the authorization of an unreasonable or non-riparian use would result in a "taking" of the riparian right of common use, while in a common law jurisdiction, where no such riparian right is recognized, authorization of the same use would not result in any "taking." Thus, the judicial rules of reasonableness and riparianness limit legislative power as well as the bed owners' liberty as to filling and building over nonnavigable lake surfaces.

Exercise of the zoning power over the beds of nonnavigable lakes in common use jurisdictions is thus limited in two ways: first, the state cannot restrict bed uses so extensively as to "confiscate" the bed owner's property without compensation; second, the state cannot authorize bed uses which are prohibited by the rules of reasonableness and/or riparian-ness, since such authorization would constitute an uncompensated "taking" of the riparian owners' right of common use. But, within these constraints, zoning of nonnavigable lake bed uses can still perform two essential functions. First, zoning ordinances can serve a delineatory function by particularly describing the uses which are permissible under the applicable judicial rule. Second, zoning ordinances can be useful devices through which to implement a new legislative policy creating additional restrictions on bed filling and building beyond those imposed by the courts.

The capacity of zoning ordinances to particularize factual situations is especially valuable as a means of eliminating some of the uncertainty which has been inherent in the court-administered tests of rea-

[117] 74 Wn. 2d 575, 580, 445 P.2d 648, 652 (1968).

sonableness and riparian-ness. By precisely delineating[118] what uses are "reasonable" or "riparian" (depending upon the jurisdiction), zoning ordinances can enable lake bed owners to utilize their property to its full legal potential by ameliorating fears of later judicial restraint. In a "reasonableness" jurisdiction, lake bed zoning could set forth legislative declarations of reasonableness thus supplanting judicial "reasonable use" assessments, just as dry land zoning superseded much of the prior nuisance theory. Judicial review would then be limited to the issue of arbitrariness or some similarly restricted question.[119]

In Washington, *Bach v. Sarich* prohibits the legislature from authorizing non-riparian uses, but particularization of uses would still be helpful. Under *Bach,* even a riparian use must be reasonable, and statutory specification of bulk and size limitations for clearly riparian structures (*e.g.* docks)[120] could serve as a legislative pronouncement that those structures which conform are reasonable. As to uses which are only arguably riparian in character (*e.g.*, a houseboat), a legislative designation of the use as "riparian" would undoubtedly influence the conclusions of the courts (unless, of course, the statute purports to authorize a clearly non-riparian use, such as a factory, which would constitute an impermissible interference with riparian rights of common use).

Beyond delineation of uses, zoning can also serve as the operational embodiment of public policies intended to extend the restrictions on

[118] SEATTLE, WASH., CODE § 26.12.040(k) (1968), providing for moorages for private pleasure craft, is an example of the particularized zoning to which we are referring:

(k) Moorages for private pleasure craft only, provided that when covered such moorages meet the following requirements:
(1) The roof line shall not exceed sixteen feet above high-water lake level.
(2) Covered *structures* shall abut upon the natural shore line.
(3) Covered *structures* shall be located five feet or more from *side lot lines.*
(4) Any side walls and roof shall consist of rigid or semi-rigid materials.
(5) The roof area of such covered moorages shall not exceed one thousand square feet in area and such roofs shall not be supported by extended piling.
(6) Such covered *structures* shall not occupy more than fifty percent of the width of the *lot* at the natural shore line upon which it is located.
(7) Any boat using such moorage shall not be used as a place of residence when so moored. (Emphasis in original.)

[119] Judicial review of a zoning ordinance has generally been restricted to review for arbitrariness or capriciousness. Typical is this statement in Bishop v. Town of Houghton, 69 Wn. 2d 786, 792-93, 420 P.2d 368, 372 (1966):

Courts . . . cannot and should not invade the legislative arena or intrude upon municipal zoning determinations, absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction.

[120] *See, e.g.*, SEATTLE, WASH., CODE § 26.12.040(k) (1968), *supra* note 118.

fills and structural uses of nonnavigable lake beds beyond those imposed by judicial rule. In this context, zoning can serve only a negative function; that is, it can only *deny* authorization to uses that would be permissible under the judicial rules. For example, under the "water-related" use test of *Bach*, the zoning authority would be without power to affirmatively authorize uses which are not in fact "water-related," for to do so, according to the *Bach* court, would be an illegal interference with the riparian rights of common use in spite of the state authorization.[121] Similarly, in a "reasonable use" jurisdiction, the legislative body may not authorize a clearly unreasonable use.[122] Under either rule, the zoning authorities could not sanction fills or buildings so extensive as to render recreational use impractical.[123]

Zoning can, however, impose further negative restrictions on lake bed fills and buildings, if they do not amount to uncompensated confiscations of bed owners' property rights.[124] Thus, restrictions short of total open space zoning, but more stringent than the bare tests of

[121] As to navigable for title lakes in Washington, the rule is apparently precisely the opposite. Justice Hill in the recent decision of Wilbour v. Gallagher, 77 Wash. Dec. 2d 307, 462 P.2d 232 (1969), ordered removal of a trailer park fill in navigable Lake Chelan, Washington on grounds that it was an unlawful interference with a public right of navigation. But in dictum Justice Hill suggested that the problem of fills

> . . . perhaps could be solved by the establishment of harbor lines in certain areas within which fills could be made, together with carefully planned zoning by appropriate authorities to preserve for the people of this state the lake's navigational and recreational possibilities.

77 Wash. Dec. 2d at 317-18 n.13, 462 P.2d at 239 n.13. The plain implication of this statement is that the state could authorize fills and buildings in navigable waters. For further discussion of the *Wilbour* opinion, see Corker, *supra* note 8.

[122] The fence cases indicate that such a result would indeed transpire. For example, in Duval v. Thomas, 114 So. 2d 791, 795 (Fla. 1959), the court enjoined, under a "reasonable use" theory, maintenance of fences blocking one riparian's access to the lake surface, deploring the situation as

> . . . a classic example of the unpleasant and impractical state of affairs that would result from the application of a rule that each owner could erect a barricade on his boundary line, even though it was of the kind, such as a fence, that would not disturb the waters in place, but would prevent adjacent owners from enjoying the ordinary pleasures of the lake.

The fence was enjoined as a transgression of the rights of the complaining riparian. A solid structure accomplishing the same result would have been equally objectionable. Authorization of such a structure by the state would be logically just as unreasonable a transgression of the riparian's rights. Therefore, despite zoning authorization, the structure would be similarly enjoinable. However, if a lake was completely unsuitable for recreational use, such a structure might well be "reasonable" since it would not interfere with any recreational uses.

[123] An exception to the confinement of the zoning power to a negative function is present in the case of the "private" lake, to which the judicial limitations would not apply (*see* notes 88-94 and accompanying text *supra*), thus allowing zoning to operate affirmatively without transgression of riparian rights.

[124] *See* notes 112-116 and accompanying text *supra*.

reasonableness and riparian-ness can probably be enacted. The desirability of such additional limitations will naturally depend upon local conditions, including the degree of commitment to (and need for) a policy of small lake preservation.

A further advantage of zoning over the present judicial regulation is that zoning can be discriminatory in its creation of restrictions beyond the judicial limitations. Especially scenic lakes, or lakes to which public access is available, for example, may require stricter controls than a lake to which there is no present public access or which is ill-suited for recreation, and a lake which is entirely useless for recreation may merit no additional restrictions at all. With respect to a particular lake, some portions of its bed and surface may require different treatment than other portions—a deep and broad section of the lake might be worthy of controls as strict as constitutionally permissible, whereas a narrow, shallow, and marshy neck of the lake might warrant no legislative control at all. Furthermore, zoning regulations can prefer some types of uses over others (park fill, for instance, over private docks). Such discrimination, however, must not deny equal protection of the laws. Heavy restrictions on construction on one lake, and no control at all on a substantially identical neighboring lake might indeed violate the equal protection clause of the fourteenth amendment.[125] But different lake situations would justify differences in zoning treatment, without violation of the equal protection clause, which thus allows ample room for particularized zoning that is justified by the facts. This flexibility of regulation is thus a primary advantage of the zoning apparatus over the judicially-administered system.

* * *

In the "common use" states, whether adherance is to the rule of "reasonableness" or "riparian-ness," judicial limitations function to preserve all but the "private" small lake by preventing private parties from constructing, and the state from authorizing, fills and buildings thereon.[126] Zoning can supplement such judicial limitations by placing

[125] Waite, *The Dilemma of Water Recreation and A Suggested Solution*, 1958 WIS. L. REV. 542, 605-06 (1958); 1 RATHKOPF, *supra* note 112, at 7-1-7-4.

[126] In non-common use jurisdictions which do not recognize a right of recreational use as a limitation on fills and structural uses of small lakes, as, for instance, the "eastern" rule states (*see* note 23 and accompanying text *supra*), zoning, or some other form of legislative regulation, is the only mechanism available for effectuating a conservationist goal of small lake preservation. This is also true as to the "private" lakes to which the judicial rules of limitation are not applicable (*see* notes 88-94 and accompanying text *supra*).

additional restrictions (short of confiscation) on lake bed uses; by discriminating (within the limits of the equal protection clause) among various lakes, portions of lakes, and uses of lakes; and by delineating the various uses permissible under the judicial limitations (so long as clearly unauthorized uses are not sanctioned), even if greater restriction is not desirable. Thus, zoning can be quite helpful, and, indeed, may be to some extent indispensable, considering the "deterring effect" which a judicial rule and the costs of litigation are likely to have on all bed uses whose riparian-ness and/or reasonableness are not obvious.[127]

B. Beyond Zoning—Some Other Techniques

Even though capable of some discriminate application, most zoning is nonetheless general insofar as it is ordinarily applied comprehensively to an entire area. Other techniques are more readily adapted to particularized treatment of a single area at a time. Without purporting to engage in any deep analysis of these techniques, we here notice three of them simply to indicate their greater potential for more individualized application. These three techniques are: (1) condemnation of lake beds, (2) condemnation of developmental rights, and (3) private agreements among bed and riparian owners.

1. Condemnation of Privately-Owned Nonnavigable Lake Beds

Condemnation of the lake bed is in many respects an ultimate solution. That is to say, a state (or locality) as owner of the condemned lake bed can preserve the lake surface for total open space, for only the owner of the bed can build or fill thereon.[128] Moreover, possible consti-

[127] There has been some comment on whether such zoning would be more properly undertaken by the state or by local zoning authorities. Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542, 600-04; Waite, *Pleasure Boating in a Federal Union*, BUFFALO L. REV. 427, 443-47 (1961) (recreational as opposed to structural use zoning). It has been suggested that local pressures might obstruct effective zoning at the local level, and this fear is probably not without basis. On the other hand, nonnavigable lakes are quite small and ordinarily situated within one municipality (if within municipal boundaries at all); in this case, local control would seem best adapted to implementation of local policies. However, as to small lakes not located within an incorporated area, standardized state zoning may be the only practical alternative.

[128] In those states in which title to the beds of small lakes is held by the state, an upland owner still has a riparian right to construct a dock to gain access to boatable waters. *See, e.g.*, Colson v. Salzman, 272 Wis. 397, 75 N.W.2d 421, 423 (1956). An interesting speculation is whether such a right could exist in favor of an upland owner after condemnation of bed title. The likelihood is that the state's ownership of the bed after condemnation would be held to differ in this respect from the trust ownership situation. However, absent condemnation of riparian as well as bed rights, it can not be known with assurity that the riparian would not be able to extend a dock over the lake surface.

tutional objections present in the case of total open space zoning of the lake surface can thus be avoided.

Many cities have in fact acquired the beds and surrounding upland of their small lakes in order to conserve them for park purposes.[129] But to undertake a general program of condemnation of the beds and upland of our small lakes would be prohibitively expensive at present land values. Condemnation of only the lake beds would reduce the cost substantially, since the value of most lake beds is likely to be modest, especially if acquisition precedes planning for construction and development. Further cost reductions can be achieved if the condemning authority acquires only those portions of the lake bed which are not yet filled or built upon.

Thus, government bed ownership would permit absolute negative restraint of fills and buildings on the lake bed; but affirmative actions by the government would still be subject to the limitations of existing judicial rules. If only the bed of a lake is condemned, riparian rights will continue to exist, since these rights ordinarily attach to the upland;[130] and the state could not violate these rights by authorizing or undertaking an unreasonable or non-riparian use of the bed. Thus, while bed condemnation would be an adequate technique for preserving open spaces, condemnation of riparian rights as well would be essential if the state desires to develop the lake surface to an extent beyond the judicial definition of the bed owner's privilege.

The main disadvantage of the condemnation of lake beds technique is its potentially prohibitive cost. Another problem is the inherent difficulty of ascertaining the rights of the various bed owners when the lake bed boundaries have not been surveyed.[131] The advantages of the condemnation of lake beds approach are that it affords a flexibility of control, and, because it is unhampered by the constitutional limitations which face the zoning process, it is capable of maintaining a completely open lake surface.

[129] *See* note 95 *supra.*

[130] *See* authorities cited in note 26 *supra.*

[131] For illustrations of the complications possible in drawing under water boundary lines see Mutual Chemical Co. v. Mayor and City Council of Baltimore, 33 F. Supp. 881 (D. Md. 1940), *modified sub nom.* Mayor and City Council of Baltimore v. Crown Cork and Seal Co., 122 F.2d 385 (4th Cir. 1941); Grill v. Meydenbauer Bay Yacht Club, 61 Wn. 2d 432, 378 P.2d 423 (1963); Hilleary v. Meyer, 91 Idaho 775, 430 P.2d 666 (1967).

2. Condemning Developmental Rights

Instead of condemnation of the fee to the lake bed, the local or state government may acquire only a conservation easement. A number of jurisdictions have employed this approach in recent years. Under this technique, the bed owner retains title to his property, but conveys his power to conserve the natural state of the bed to the governmental unit. Compensation for this right is computed by subtracting the value of the land with no possibility of development from its former value with developmental potential; after condemnation, the owner will be taxed only on the unimprovable land value. Special legislation, however, may be necessary to authorize use of this procedure.[132]

Although condemnation of developmental rights on a lake bed would be less costly than a similar condemnation of such rights on dry land, or a condemnation of the lake bed itself, still cost is a factor which significantly affects the feasibility of this technique. Condemnation of scenic easements would preserve lakes as open space for recreation and view purposes, but the limitations on development by the governmental body would persist, because title to the bed would remain in private ownership.

3. Private Agreements among Riparians and Bed Owners

Private control through deed or contract restrictions is another available tool for conservation of lake surfaces.[133] The major obstacle to the success of this type of control is the difficulty of obtaining concurrence among all bed and upland owners. Nevertheless, subdividers and developers could use reciprocal deed covenants in their development of as yet untarnished lake areas in order to assure maximum preservation of open space for common use. Ordinarily, such private controls can operate only to impose additional restrictions on bed use, since only unanimous private agreement can potentially derogate from judicial

[132] For a general discussion of scenic easements, see W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Urban Land Institute, Technical Bulletin No. 36) (1959). For a Wisconsin case upholding the condemnation of scenic easements along the Mississippi River see Kamroski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

[133] An example of private control can be seen in Hammet v. Rosensohn, 26 N.J. 415, 140 A.2d 377 (1958), *aff'g* 46 N.J. Super. 527, 135 A.2d 6 (1957) where a riparian's construction of a bath and boathouse over the surface of a nonnavigable lake was prevented by enforcement of a deed restriction. (Absent the restriction, the use would have been clearly permissible under New Jersey law.)

limitations, and not even unified consent can avoid a zoning restriction. Such private controls will thus probably be rare, yet the technique is available and useful where a group of riparians and bed owners decide that the advantages of an open lake surface outweigh the loss of lake bed developmental rights.

CONCLUSION

The conflicts between private bed owners and holders of riparian rights will doubtless increase as our population grows and urban areas expand. Only a combination of judicial and legislative methods holds any hope of resolving these conflicts and protecting the public interest in conserving our small lakes for recreation and open space. At a minimum, we suggest that any effective approach to this nonnavigable lake problem should include two components.

The first essential element is a judicial rule—either the traditional test of "reasonableness" or the "riparian use" test of *Bach v. Sarich.* Such a judicial limitation is required to reconcile bed and surface uses by denying rights of exclusive use to either bed owners or surface users, and to operate as a check on overly permissive or politically-pressured public authorities who might permit such extensive fills and construction on some lakes as to render them unusable for recreation.

The second element necessary to a solution of this problem is legislative regulation in the form of zoning, which can furnish the specificity required to overcome the inherent uncertainty of the terms "reasonable" and "riparian." Zoning can also impose restrictions more stringent than the judicial limitations, and can fashion particularized and discriminating regulations to control particular lake, riparian, and use situations. Zoning is especially important in the case of "private" lakes, to which judicial limitations might not apply.

Beyond zoning, condemnation of lake beds or conservation easements may be appropriate in certain cases where total open space zoning might constitute a "taking" of property without "just compensation," but it is still deemed desirable to maintain a particular lake entirely free of structural uses and fills, in order to maximize its scenic and recreational aspects. Cost factors limit the feasibility of such condemnation techniques, however, and such specific procedures cannot match the general comprehensiveness of zoning controls. Private con-

trols through deed or contract provisions will be useful in those cases where individual bed owners and riparians desire greater restrictions than public officials are willing to establish.

In this new decade, population growth and urban expansion will be accompanied by increased developmental pressure on our nation's small lakes. We would thus close by stressing the urgent need for prompt action on the part of urban planners and other officials if comprehensive controls are to become operational before more of our small lakes fall prey to the accelerated onslaught of private development.